United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-1072

United States Court of Appeals
For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM J. ROTHAAR, ET AL.,

Appellants.

Appeal From The United States District Court For The Eastern District of New York

APPELLANT'S BRIEF

B P/S

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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THE UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM J. ROTHAAR, ET AL.,

Appellants.

----------X

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WILLIAM J. ROTHAAR

STATEMENT

The appellant, WILLIAM J. ROTHAAR, appeals from a judgment rendered in the United States District Court for the Eastern District of New York (Judge Edward R.Neaher) convicting him of the crime of possession with intent to distribute a quantity of Phenobarbital, in violation of Title 21,United States Code, Section 841 (a) (1), and Title 18, United States Code, Section 2. (A 1) *

Proceedings were begun when the appellant

*Numbers in parenthesis preceded by letter A refer to Appellant's appendix.
Numbers in parenthesis preceded by letter T refer to Trial transcript.

was indicted in the Eastern District of New York. The indictment alleged two (2) counts. The First Count charged the appellant and three (3) co-defendants with possession with intent to distribute 300,000 tablets of Phenobarbitol on or about May 20, 1976, in violation of 21 United States Code 841 (a) (1) and 18 United States Code 2; the Second Count charged the appellant and three (3) co-defendants with a conspiracy commencing on a date unknown and continuing until and including May 20, 1976 to possess with intent to distrubute 300,000 tablets of Phenobarbitol, in violation of 21 United States Code 846.

A jury trial was begun on December 13, 1976. At the end of the Government's case the conspiracy charge in Count two (2) of the indictment was dismissed and the appellant and two co-defendants were found guilty on the possession charge.

A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. The defense motion for a judgment of acquittal should have been granted as to Count One (1) of the indictment as to appellant Rothaar.

B. Was Appellant's guilt established beyond a reasonable doubt ?

C. Should certain evidence have been excluded as to Appellant Rothaar ?

STATEMENT OF THE CASE AGAINST THE APPELLANT

The Government's case was presented through the testimony of: Joseph Grande, a co-defendant who after being arrested on May 20, 1976 agreed to cooperate with the Government and was awaiting sentence at the time of trial; DEA Special Agents McKinley, Guillen, Baker, Cavuto and Joseph Barbato, a chemist employed by the DEA.

At trial the Government's case established that on May 18, 1976, the defendant Sciotto called Grande at the latter's laundromat and told him that he had about 350,000 headache pills. Sciotto did not know what kind of pills they were and Grande told Sciotto to bring him a sample. (T38,40)

The next day, May 19, 1976, Sciotto arrived at the laundromat and told Grande he had the pills in a car around the corner. Grande told Sciotto to bring them in the front door which he did. Upon seeing that the pills were old and burnt, Sciotto told Grande if he knew they were like this, he wouldn't have brought them. (T46-49)

Sciotto told Grande they wanted 4¢ a piece, but Grande told Sciotto to get the pills out of the laundromat. Sciotto thereupon said he was going to call the guys and made a call from the front of the laundromat. Sciotto then left the laundromat, called Grande later in the afternoon and told him the guys wanted $500.00. Grande

testified he told Sciotto and an unknown individual he didn't want them and if the pills were not out of the laundromat he would dump them. (T49-52)

The next day, May 20, 1976, at about 8:00 A.M., Grande arrived at the laundromat and was arrested while he was loading the pills in a car. He showed the agents the rest of the boxes in the laundromat, agreed to cooperate with the Government and was then taken to DEA Headquarters in Manhattan where he was interviewed. (T52-52,119)

Prior to leaving DEA Headquarters, Grande called Sciotto and told him that the most he could get was 2¢. They agreed to meet at 20 to 2 on the corner of Nostrand Avenue and Avenue N in Brooklyn. The conversation was recorded and played for the jury. (T53-54,65)

Within a few minutes after Grande returned to the laundromat with Agent McKinley, Sciotto unexpectedly walked in. When Grande asked him what he was doing here, Sciotto replied "I brought the fellows to collect the money". Grande told Sciotto to give him 5 minutes whereupon Sciotto left. Grande testified that Rothaar and Arcuri were not standing there when he spoke to Sciotto and that he first saw Sciotto with them 50' away in the front of the laundromat. (T66-70,132)

While Agent McKinley was making a call Grande went out to look for the men and saw all three exit a

pizzeria on the corner. Sciotto introduced the two men to Grande as Bill (appellant William Rothaar) and Phil (co-appellant Philip Arcuri). (T70-71)

The four men entered the laundromat and went directly to Grande's office in the back. Appellants Rothaar and Arcuri entered the office and were introduced to Agent McKinley, who was seated at the desk, as the gentleman who offered the two cents. (T71)

Grande testified appellants Rothaar and Arcuri shook hands with McKinley upon being introduced to him and the only thing that Appellant Rothaar did was "He just shook his head...from side to side," and followed Arcuri, who "just walked to the door." (T72-74) This took about one(1) minute. (T139)

As Arcuri was walking out, Grande asked him, "Don't you want to talk to the man". Arcuri replied "Let him talk to him". (T74)

Within seconds after Appellants Rothaar and Arcuri left the office, McKinley arrested Sciotto, went after appellants Rothaar and Arcuri and arrested them. (T73)

Grande further testified that he never saw Rothaar or Arcuri before that day and to his knowledge, Sciotto was an honest man. (T36-37,114,158) and that the entire time he was with appellant Rothaar he never said anything about pills or money (T 136-140, 158).

Consistent with Grande's testimony, McKinley testified

that when Sciotto first entered the laundromat, he did not see appellants Rothaar or Arcuri and that he never saw Rothaar touch or handle any pills, or hear him discuss touching, handling or distributing any pills or the passing or receiving of money or at any time in conversation with Grande, Sciotto or Arcuri. Rothaar was just shaking his head from side to side. (T173,207, 210,211-212)

In contrast to Grande's testimony, Agent McKinley testified that Rothaar was the only one to enter the office and that Arcuri was always outside of the office, except to stick his head in for a period of five (5) seconds. (T173,218) Furthermore, in stark contrast to Grande's testimony, McKinley testified that Grande introduced him as "the guy who wants to buy the pills" and that to his knowledge nothing else was said. (T172-174)

Joseph Barbato, a chemist employed by the DEA, testified that the tablets comprising Government Exhibits 11,12 and 13 contain phenobarbital. (T447,449,450,460062)

At the conclusion of the Government's case, the defense rested and moved for a judgment of acquittal based upon the governments failure to establish a prima facie case. (T463-468)

Following lengthy argument, the Court dismissed count two(2) of the indictment (conspiracy count), but

submitted the possession count to the jury. (T468-514)

Thereafter the appellant Rothaar, along with the two (2) co-appellants was found guilty of count one (1) of the indictment.

POINT ONE

THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED AS TO COUNT ONE OF THE INDICTMENT AS TO APPELLANT ROTHAAR

By indictment, the appellant WILLIAM ROTHAAR was charged with aiding and abetting three co-defendants with the crime of possession with intent to distribute a controlled substance (Phenobarbitol) and conspiracy to commit same.

At the close of the entire case the defendants moved for a judgment of acquittal. (A62-67) The Court denied the motion as to Count One (possession charge) as to all defendants and granted the motion as to Count Two (conspiracy charge) as to all defendants. (A67-113)

The appellant Rothaar contends that the motion for a judgment of acquittal should have been granted as to him as to Count One of the indictment.

Case law holds that the test to be applied by the trial Court in determining the motion is whether upon all of the evidence in the case, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. U.S. V. TAYLOR, 464 F 2d 240, 243 (2d Cir. 1972); U.S. V. HASKELL; 327 F.2d 281, 282 2 (2d Cir. 1964)

Initially, it must be noted where several defendants are jointly tried and evidence is admitted as to some but not all, as in the case at bar, the Court must treat

each defendant separately by considering only the evidence that was introduced against the respective defendant.

Accordingly, the issues presented to this Court for determination are twofold:

First: What evidence could the trial Court consider against the Appellant Rothaar in determining the motion; and

Second: Once determining that evidence, could a reasonable mind fairly conclude guilt beyond a reasonable doubt therefrom ?

With regard to the First issue, lengthy argument was had between counsel and the Court concerning the merits of the motion. (A62-113) Ultimately, the Court found there "(was) sufficient circumstantial evidence for the jury to conclude that...the other two defendants (Rothaar and Arcuri) were the aiders and abetters". (A104-105)

As the record indicates,the evidence referred to by the Court was

> "the testimony of Grande about the activities of Sciotto, that Sciotto himself had been in possession of these (pills) with an attempt to distribute, that he brought others following the telephone arrangements to try to close a deal to pick up for it. Sciotto was there to try to collect the money according to his own statement. He said I would not have brought this junk to you and all that..." (A105)

The appellant respectfully contends that the evidence considered by the trial Court regarding appellant's participation as an aider and abetter was improper.

Emphasizing that the Court dismissed the conspiracy charge, the evidence referred to by the Court was binding and attributable only to the defendant Sciotto and not to the defendant Rothaar. As indicated in the record, the Court instructed the jury at least twice, that the acts and statements of the co-defendant Sciotta were not binding on appellant Rothaar and that Rothaar was to be judged "only by his own statements or his own conduct". (A6-7,8,9-10,11)

Contrary to its earlier rulings, the Court admitted over objection and without limiting instructions Sciott's statement to Grande made on May 20th, "I brought the fellows.. that come for the money". (A12) Appellant contends that it was error to admit said conversation which was not in appellant's presence, against your appellant. (A12-14,19,20,29-30) Accordingly, it was error for the Court to use same in deciding the motion for acquittal.

Further noting that the Court struck from evidence all testimony and exhibits regarding appellant Rothaar's connection with the white Lincoln, the evidence seized from said car should have been excluded as to appellant Rothaar upon co-counsel's motion to strike all evidence taken subject to connection. (A48-49,54-56,59,60,51,67,113, 114)

Absent the above noted evidence, the only evidence

that remains against the appellant Rothaar was that Sciotto introduced him to Grande as Bill and that when Grande introduced Agent McKinley to appellant as the man that offered two cents or the man that wanted to buy the pills, appellant, without speaking a word, shook his head from side to side and walked out of Grande's office. (A16-18,21,22,23-24,25,32-34)

Turning now to the second issue,based upon the evidence properly considered against appellant Rothaar, appellant respectfully contends that a reasonable mind could not fairly conclude that he aided and abetted in the possession with intent to distribute beyond a reasonable doubt, notwithstanding the fact that said evidence must be viewed in a light most favorable to the Government. U.S. V. BOHLE, 475 F2d 872,875 (2d Cir. 1973)

At the very least, the actions attributable to appellant Rothaar bespeak an unwillingness to participate. To infer therefrom that this was based on appellant's apprehension that McKinley was the law, as argued by the prosecutor at trial, is a matter of speculation and conjecture and not an inference based on reason and common sense. Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39,51 (1962)

Assuming for arguments sake that McKinley's testimony that Grande introduced him as the man that wanted to buy the pills was correct, although it is

appellant's contention that said testimony is highly suspect, this lends further support to appellant's negative actions in refusing to participate in the transaction. There being no evidence introduced against appellant inferring that he had knowledge of the nature of the transaction prior to his introduction to McKinley, upon gaining said knowledge, appellant immediately negated his participation.

By reason of the above Count One should be dismissed as against the Appellant Rothaar.

POINT TWO

THE APPELLANT'S GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT

In the interest of brevity, appellant reasserts the argument set forth in Point One and incorporates it into the argument in Point Two.

Assuming that this Honorable tribunal should disagree with appellant's contention set forth in Point One, appellant contends that his guilt was not established beyond a reasonable doubt.

Constitutional due process mandates that in criminal actions the Government must prove beyond a reasonable doubt every fact necessary to establish the crime charged as well as the defendant's participation therein. In re WINSHIP 397 U.S. 358,364 (1970) Moreover, this burden of proof of guilt never shifts from the Government. U.S. V. VIGORITO, 67 F 2d 329,330 (2d Cir. 1933),cert. denied, 290 U.S. 705 (1934)

Notwithstanding the fact that this Court must view the evidence in a light most favorable to the Government (GLASSER V. U.S., 315 U.S. 60,80 1942), this is not to say that said evidence was insufficient to overcome the presumption of innocence that clothed the appellant till the jury's finding of guilt.

Thus, the issue to be determined by this Court is

whether the evidence introduced against the appellant Rothaar was of such a convincing nature as to overcome his presumption of innocence and establish his guilt beyond a reasonable doubt. Mathes, Jury Instructions and Forms for Federal Criminal Cases 127 F.R.D. 39, 51 (1962)

As previously noted in Point One, at the conclusion of the entire case the trial Court dismissed the conspiracy charge.

Although this dismissal does not automatically bar appellant's conviction for the substantive offense (U.S. V. FINKELSTEIN, 526 F 2d 517 2d. Cir. 1975), under the facts of this case, this Court must view same as a significant factor in determining the sufficiency of the evidence against the appellant on the remaining charge.

As the indictment indicates, the Government's theory of proof was that Rothaar aided and abetted the co-defendants in the possession of the Phenobarbitol tablets. The evidence introduced against the appellant Rothaar establishing same was that Sciotto, unexpectedly and without prearrangement brought Rothaar to the laundromat to collect the money,* introduced Rothaar to Grande as Bill, and that when Agent McKinley was introduced

* It was appellant's contention in Point One that Sciotto's statement to Grande, out of appellant's presence is not binding on appellant and should this Court agree, the evidence against Rothaar is that much weaker.

to Rothaar as the man that offered two cents or the man that offered to buy the pills, Rothaar shook his head from side to side and walked out of Grande's office.

As noted in Point One, appellant Rothaar's conduct evidenced an intention not to participate in the transaction. Although the Government argued and apparently the jury agreed, that this was due to appellant's fear that McKinley was the law and the meeting a trap, this inference is mere speculation, without any basis in the record. Moreover, for the jury to draw this inference, they would first have to find or infer from the evidence that appellant Rothaar knew about the nature of the transaction, prior to having McKinley introduced to him as the man who offered to buy the pills.

Appellant contends that there was no evidence introduced to support the latter finding and submits that the trial Court's dismissal of the conspiracy count, is determinative of the issue. By dismissing the conspiracy charge the trial Court found as a matter of law, insufficient legal evidence, direct or circumstantial, that the co-defendants agreed to possess the tablets with intent to distribute them. U.S. V. RABINOWICH, 238 U.S.78, 87-89 (1915): GLASSER V. U.S., Supra

Absent any showing of a conspiracy among the co-defendants, the remaining evidence is insufficient to establish beyond a reasonable doubt that appellant Rothaar, knowingly and intentionally, aided and abetted

in the possession of the tablets.

In conclusion, it is a well established principal of law that the mere presence at the scene of a crime or even knowledge of a crime is insufficient for conviction. As such appellant's conviction should be reversed and the indictment dismissed.

POINT THREE

THE APPELLANT ROTHAAR'S CONVICTION WAS BASED UPON EVIDENCE NOT PROPERLY BEFORE THE JURY

During the course of trial, the following evidence was introduced against the appellant Rothaar either subject to connection or over counsel's objection:

Government Exhibit 3: New York State Insurance Indemnification card recovered from Arcuri's wallet. (A26-28)

Government Exhibit's 4-12: Phenobarbitol tablets seized from Grande on May 20, 1976. (A36-47)

Government Exhibit's 13-20: Bottle of Phenobarbitol, summons, hat,gloves,etc., recovered from glove compartment of white Lincoln.(A48-49,56,60)

Government Exhibit 21: Miranda Card used to advise Arcuri of rights (A58)

Government Exhibit 22: Keys from white Lincoln (A59,61)

Sciotto's statement to Grande, not in Appellant's presence "I brought the fellows to collect the money". (A12-13)

At the close of the entire case, defense counsel moved to strick the evidence taken subject to connection. (A67,70,73)

Upon dismissing the conspiracy count, the Trial Court struck from Evidence Government Exhibit 22 and the testimony of Pagan Cavuto and Guillen regarding said exhibit. (A112-113,114)

Appellant contends that the remainder of the above noted evidence should have been excluded.

With regard to exhibit 22, there is no evidence that would connect appellant Rothaar to the white Lincoln. As such exhibits 13-20 should have been excluded as to appellant, Rothaar. As the record indicates this evidence was requested by the jury during their deliberations. (A143-144)

With regard to exhibit 3 (NYS Insurance Indemnification Card recovered from Arcuri's wallet) Exhibit 21 (the Miranda card used to advise Arcuri) and Sciott's statement to Grande out of appellant's presence, this evidence should have been excluded as to appellant Rothaar by reason of the dismissal of the conspiracy count.

With regard to exhibit 4-12, the Phenobarbitol tablets allegedly seized from Grande, in the absence of a conspiracy among the co-defendants, there was no evidence establishing either actual or constructive possession of the tablets by appellant Rothaar. Moreover, Grande never identified the evidence as the pills or boxes that he allegedly received from Sciotto.

Pursuant to Rule 401 of the Federal Rules of Evidence, relevant evidence is defined as

> "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Appellant respectfully contends that by reason of the Government's failure to connect the appellant Rothaar to the hereinbefore noted evidence said evidence should have been excluded as irrelevant to establishing appellant's guilt.

Moreover, as to Exhibit 20, the gloves and hat recovered from the white Lincoln,said evidence, which is highly prejudicial and had no relevancy to the issues at trial, was introduced by the Government solely to inflame the jury against the co-defendants as men of bad character and individuals capable of committing other crimes. (A50-57)

Since appellant's character was not a material element of the charge, nor put into issue by him, the introduction of this highly prejudicial evidence, in and of itself requires a reversal of appellant's conviction.

POINT FOUR

THE APPELLANT ROTHAAR ADOPTS ALL POINTS AND ARGUMENTS OF CO-APPELLANTS THAT WOULD BE APPLICABLE TO HIM

CONCLUSION

THE APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Dated: Brooklyn, New York
August , 1977

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of August ,19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent servied the within Brief
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
11 day of August 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978